

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 UNITED STATES OF AMERICA,

4 | VS.

Criminal No. 13-270

5 ATIBA WARREN,
Defendant.

Transcript of Oral Argument Proceedings on Tuesday, May
8 10, 2016, United States District Court, Pittsburgh,
Pennsylvania, before Mark R. Hornak, District Judge.

10

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1 (Proceedings held in open court; Tuesday, May 10, 2016.)

2 THE COURT: We're here this afternoon for an
3 argument and hearing and criminal docket matter, the United
4 States of America versus Mr. Atiba Warren.

5 Counsel for the United States, please enter her
6 appearance.

7 MS. KING: Katherine King.

8 THE COURT: Good afternoon, Ms. King.

9 Who is with you at counsel table?

10 MR. ORTIZ: Jonathan Ortiz.

11 THE COURT: Good afternoon.

12 Will counsel for Mr. Warren please enter his
13 appearance.

14 MR. SCHORR: Damien Schorr for Mr. Warren.

15 THE COURT: Good afternoon.

16 Mr. Warren is with you at counsel table?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Good afternoon.

19 Let me just confirm a couple of things real quickly.

20 Mr. Babik, please administer an oath to Mr. Warren.

21 (Administration of the oath.)

22 THE CLERK: Please state your name for the record.

23 THE DEFENDANT: Atiba Chemi Warren.

24 THE COURT: Mr. Warren, as we get started today, I
25 just want to confirm a couple of things.

1 Just to confirm for the record, you're represented
2 by a lawyer. That lawyer is Mr. R. Damien Schorr, who is
3 seated right next to you at counsel table.

4 Is that correct, sir?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: You understand that the reason the Court
7 has set today's hearing is to hear presentations from your
8 lawyer and the lawyer for the United States on certain factors
9 that would be important to the Court in determining what your
10 sentence will be, but it's not the Court's intention to set
11 your sentence today, this is to handle some legal matters that
12 would affect how your sentence is determined.

13 Do you understand that, sir?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Mr. Warren, have you had a chance to
16 talk about today's hearing with Mr. Schorr and have him explain
17 to you what is going to be going on today?

18 THE DEFENDANT: Yes, I have, Your Honor.

19 THE COURT: Mr. Warren, let me ask you this, sir.
20 Do you have any difficulty at all understanding what is going
21 on around you today?

22 THE DEFENDANT: No, Your Honor, I understand very
23 well.

24 THE COURT: Within the last 24 hours, sir, have you
25 taken any prescribed or non-prescribed drugs?

1 THE DEFENDANT: No, I have not, Your Honor.

2 THE COURT: In that same time period, sir, have you
3 had any alcohol or alcoholic beverages?

4 THE DEFENDANT: No, no, Your Honor.

5 THE COURT: Mr. Schorr, any doubts as to
6 Mr. Warren's competence to participate in today's hearing?

7 MR. SCHORR: No, sir.

8 THE COURT: Ms. King, same question of you?

9 MS. KING: No, Your Honor.

10 THE COURT: Based on your answers to my questions,
11 my observations in court, the representations of your lawyer,
12 Mr. Schorr, and the lawyer for the United States, Ms. King, I
13 find you are competent to participate in today's hearing.

14 Based on my reading of the status report, nobody
15 anticipates any presentation of testimony today, it's
16 essentially argument based on matters that are placed on the
17 record and legal matters that are otherwise relevant to the
18 issues involved.

19 Is my understanding correct?

20 MR. SCHORR: Your Honor, Mr. Warren may need to
21 testify, but that's the only other witness.

22 THE COURT: That would be your call if you determine
23 that's needed.

24 Ms. King, is that your understanding also?

25 MS. KING: Yes, Your Honor.

1 THE COURT: When Mr. Warren was represented by prior
2 counsel, Mr. Sindler, we got the sentencing documentation from
3 Mr. Sindler and Ms. King, and one of the issues that was raised
4 on Mr. Warren's behalf by Mr. Sindler was whether the statutory
5 provisions regarding what is known as an armed career criminal
6 status and the career offender provisions of the advisory
7 guidelines apply.

8 The presentence investigative report that was
9 prepared and filed by the United States Probation Office in
10 this case at the relevant paragraphs relating to the
11 calculation of the advisory guideline range specifically
12 determine that the offense of conviction, when considered in
13 conjunction with Mr. Warren's prior criminal record would cause
14 his designation as a statutory matter as an armed career
15 criminal, which made him subject to mandatory minimum term of
16 imprisonment, and further, that those same matters triggered
17 the career offender provisions of the United States Sentencing
18 Guidelines, which enhanced his total offense level and his
19 criminal history category, which resulted in the guidelines and
20 minimum sentence calculations contained in the PSI.

21 Mr. Sindler, on Mr. Warren's behalf, filed a
22 memoranda taking issue with those computations.

23 Ms. King on behalf of the United States has stated
24 the position of the United States that the presentence report
25 is correct in those regards, and she's filed supplemental

1 memoranda based on a recent decision from March of this year
2 from Judge Bates in the United States District Court for the
3 District of Columbia in a case called United States versus
4 Moore.

5 So, that appears to be the issue that is before the
6 Court.

7 Mr. Schorr, do you concur that that's the issue that
8 the Court is going to have to resolve before there could be a
9 sentencing hearing in this matter?

10 MR. SCHORR: Not only that, we're contesting one of
11 the previous drug felony convictions.

12 THE COURT: Contesting it as being a qualifying
13 conviction?

14 MR. SCHORR: Yes, sir.

15 THE COURT: With that amendment by Mr. Schorr,
16 Ms. King, do you agree those are the issues the Court needs to
17 resolve?

18 MS. KING: Yes, Your Honor.

19 THE COURT: Since it is an objection to the
20 presentence report and the calculation of the now advisory
21 guidelines in it, it's probably appropriate that we hear first
22 from you, Mr. Schorr.

23 Is that agreeable with you?

24 MR. SCHORR: Sure. Unless Ms. King wants to go
25 first. She gave me a nice stack of exhibits, if she wants to

1 put them in so we can talk about them.

2 THE COURT: Ms. King?

3 MS. KING: I'm happy to go first, but I don't have
4 any objections to the presentence report.

5 THE COURT: So we'll start with Ms. King.

6 You're free to present your position as you are,
7 Mr. Schorr, seated or standing at counsel table or from the
8 podium, wherever is most comfortable for you. I just ask that
9 you tip the mics down if you're going to be at counsel table.

10 MS. KING: Thank you, Your Honor.

11 The government would rely on our response to the
12 defendant's position with respect to sentencing factors. It is
13 our position that Mr. Warren is an armed career criminal based
14 on three prior robbery convictions which, for purposes of
15 sentencing, would be counted as one, as it was one incident
16 involving three individual victims, and two prior felony drug
17 convictions, which occurred all in Maryland. And in our
18 response to the defendant's position with respect to sentencing
19 factors, we laid out the reasons why we believe the defendant
20 does qualify as an armed career criminal.

21 I do have several exhibits for the Court which I
22 think would assist in the Court's determination.

23 THE COURT: Happy to see them, Ms. King.

24 MS. KING: I have provided them already to
25 Mr. Schorr.

1 THE COURT: Just so we could note them for the
2 record, Government Exhibit 1 appears to be a computer printout,
3 2016 Westlaw provisions of 2002 Maryland Laws, Chapter 26
4 (H.B. No. 11) entitled Criminal Law.

5 Government Exhibit 2 appears to be from 2005,
6 Maryland Law, Chapter 567, H.B. No. 663, Crimes - Robbery By
7 Display of Written Instrument Claiming Possession of Dangerous
8 Weapon and its various subsections.

14 The first page I would note bears a printout legend
15 at the top of the first page of 13:38:37 Friday, August 2,
16 2013.

17 Government Exhibit 4 appears to be a similar
18 certified document from Clerk Conaway, bearing the date of
19 Friday, August 2, 2013 in the upper left corner.

20 Government 5 appears to be a similar document from
21 Clerk Conaway, also a Friday, August 2, 2013.

22 And No. 6 appears to be a compilation exhibit of
23 various provisions of the Maryland Code, specifically at the
24 first document, Article 27 Section 486.

25 Mr. Schorr, have you been provided copies of each of

1 these exhibits?

2 MR. SCHORR: Yes, sir.

3 THE COURT: Do you have any objection to the Court
4 accepting them into the record of today's proceeding?

5 MR. SCHORR: No objection to your accepting them,
6 Your Honor. We can discuss them, though, individually.

7 THE COURT: Absolutely. I just want to see if we
8 all know what is in the record before we begin the discussions.

9 MR. SCHORR: No objection, Your Honor.

10 THE COURT: Without objection, Ms. King, each of the
11 exhibits that I've just made reference to is admitted into the
12 record.

13 MS. KING: Thank you, Your Honor.

14 I can clarify further. Government Exhibit 3 is a
15 copy of the certified copy of the defendant's robbery
16 convictions. I have the actual certified copies here, but I
17 prefer to keep them for my records, if that's okay with the
18 Court.

19 THE COURT: Mr. Schorr, do you need to have any
20 further examination or comparison of the original certified
21 copy from Clerk Conaway?

22 MR. SCHORR: I have no problem with using copies,
23 Your Honor.

24 THE COURT: We can accept the copies as true and
25 correct copies for all purposes in these proceedings?

1 MR. SCHORR: Yes, sir.

2 THE COURT: Ms. King, I would just direct that you
3 maintain as custodian the original certified documents, if
4 they're needed for further purposes of this Court or any other
5 United States court that would be involved with this case.

6 MS. KING: I will, Your Honor. Thank you.

7 Exhibit 3, there are three components to Exhibit 3.
8 They reference the defendant's three cases relative to his
9 robbery convictions. Again, it was all essentially the same
10 case. I guess Maryland breaks it out by victim. So, if the
11 Court, if the Court ever actually looks through, each one of
12 these will reference a different victim's name, but for
13 purposes of today, it's really all just one conviction.

14 THE COURT: It was one event involving three
15 victims?

16 MS. KING: Yes.

17 Exhibit 4 is a copy of the defendant's certified
18 conviction from his 2002 drug conviction.

19 And that is the conviction that is detailed at
20 Paragraph 30 of the presentence investigation report. It was a
21 conviction for distribution of heroin.

22 Then Exhibit 5 is a certified copy of the
23 defendant's conviction for his 2007 conviction of possession
24 with intent to distribute cocaine, which is detailed at
25 Paragraph 33 of the presentence investigation report.

1 Normally, I'd attach these to my sentencing
2 memorandum, but I figured I would provide them to the Court
3 today because we're here.

4 Exhibits 1, 2, and 6 relate to the crime that I
5 think is the biggest contested issue, which is the defendant's
6 conviction for robbery with a dangerous and deadly weapon from
7 Maryland. I wanted to provide these to the Court because it
8 actually took quite a bit of digging to find the original
9 statute under which the defendant was convicted and that is
10 Exhibit 6.

11 So Exhibit 6 also has several parts. The first
12 part, as the Court can see, is Section 486, which contains the
13 definitions and down at the bottom of the first page contains
14 the definition for robbery.

15 And then Section 487, which is kind of the second
16 part of this, contains the definition for robbery with a
17 dangerous or deadly weapon.

18 That is the crime of which the defendant was
19 convicted under this statute.

20 So, a person may not commit or attempt to commit a
21 robbery under Section 486 of this subheading with a dangerous
22 or deadly weapon.

23 The next part is Section 488 of the Maryland Code,
24 Article 27, Section 488, which kind of just tells prosecutors
25 how to write out the charging documents. But they are all

1 related so I wanted to provide those to the Court.

2 The reason those are important, Your Honor, is that
3 in looking back on my response to Mr. Sindler's position with
4 respect to sentencing factors, I misidentified the section
5 under which the defendant was originally sentenced. I don't
6 know if the Court has my original response.

7 THE COURT: Let me pull it up here.

8 That would be ECF 151?

9 MS. KING: Yes, Your Honor, that's correct.

10 THE COURT: I have it right in front of me.

11 MS. KING: Page 2 onto Page 3 of that document, I
12 had stated that the defendant was convicted essentially under
13 this statute and then listed it out, which says a person may
14 not commit or attempt to commit robbery under Section 3-402 of
15 this subtitle with a dangerous weapon or by displaying a
16 written instrument claiming that the person has possession of
17 the dangerous weapon.

18 In fact, that statute was amended in 2005, as is
19 exhibited in Government's Exhibit 2, to add subsection (2),
20 which talks about that you can commit armed robbery by
21 displaying a note basically saying that you have a weapon.

22 So, when the defendant was convicted in 2002, that
23 subsection (2) was not a part of the statute. So, he was
24 convicted only of committing a robbery by use of a dangerous
25 weapon. That's actually important --

1 THE COURT: So you're saying in 2002, the only
2 section, the only provision as to robbery was by committing it
3 with a dangerous weapon, armed robbery?

4 MS. KING: Exactly. Yes, Your Honor. I don't know
5 if the Court had the opportunity to read the District of
6 Columbia --

7 THE COURT: Judge Bate's opinion?

8 MS. KING: Yes, Your Honor.

9 THE COURT: Oh, yes. He talks about poison and
10 radiation and all sorts of stuff and the fact that the
11 Maryland, the two opinions from the Maryland Court of Special
12 Appeals don't appear to ever have been applied anywhere else,
13 according to Judge Bates.

14 MS. KING: Exactly. That's also -- personal
15 research that I have done myself, I have not found any that
16 applied Maryland armed robbery to a crime against property.
17 But the important thing is in Judge Bates' opinion, he notes
18 that in his opinion, the Maryland robbery statute is divisible
19 and because of that, you could commit it with a dangerous
20 weapon or by using a written instrument.

21 But that would not necessarily apply to Mr. Warren
22 because at the time he committed the crime, you could only
23 commit it by using a deadly and dangerous weapon. That's why I
24 wanted to provide Exhibits 1, 2, and 6 to the Court so you can
25 see how the statute evolved.

1 But I do think that Judge Bates' opinion is
2 particularly applicable here, even though that was in the
3 career offender context, it is still looking at the exact same
4 language, the force clause essentially, and I do think there is
5 no way to commit robbery with a dangerous and deadly weapon
6 under Maryland law that does not have as an element the use,
7 threatened use or attempted use of force. So, I do believe
8 that it does qualify under the force clause and as a result, it
9 is a crime of violence.

10 THE COURT: Let me ask you this, Ms. King. And I'm
11 not saying words don't matter in what all of us do around here,
12 so what you've quoted in your brief talks about you cannot
13 commit or attempt to commit robbery with a dangerous weapon,
14 and 487 in Exhibit 6 says you cannot commit or attempt to
15 commit a robbery under Section 486 with a dangerous or deadly
16 weapon.

17 MS. KING: Yes, Your Honor. And if you actually
18 look to -- I can say from doing research that when Maryland
19 changed the way that they kind of categorized their laws, they
20 specifically said that a weapon that is a dangerous weapon is
21 necessarily a deadly weapon. So, they just subsumed it right
22 into dangerous. So any weapon that in their view would be a
23 deadly weapon is also a dangerous weapon.

24 THE COURT: And that was the law in 2002?

25 MS. KING: Yes. When the defendant was convicted,

1 it was a dangerous and deadly weapon, and then when the law was
2 changed in 2002, I think they changed it to just a dangerous
3 weapon.

4 THE COURT: So in 2002, was it dangerous and deadly
5 or dangerous or deadly? I am not being picky for pickiness
6 sake, but the language, as you and Mr. Schorr pointed out --

7 MS. KING: Dangerous or deadly. But I will also say
8 that when the law was adopted -- when it was classified as a
9 criminal law as opposed to what it was before, the legislature
10 specifically said that it was changed -- it was adopting it
11 without any substantive changes. So while the language may
12 have changed, the meaning behind the law was not changing.

13 THE COURT: So prior to this, robbery in Maryland
14 was a common law crime?

15 MS. KING: Yes.

16 THE COURT: So, when Mr. Warren was convicted of the
17 offenses that are set forth at Government's Exhibit 3, it was a
18 statutory offense?

19 MS. KING: I believe that it was still considered a
20 common law crime under the Maryland Code. From what I
21 understand, it was a common law crime with statutory penalties.
22 But then when it was adopted into the actual Maryland Criminal
23 Code, which occurred in 2002, it became a criminal law.

24 THE COURT: That was one of the issues Judge Bates
25 dealt with where the defense was raised that dangerous weapon

1 was merely a sentencing factor and not an element of the
2 offense, but Judge Bates said that for federal sentencing law
3 purposes, it counted.

4 MS. KING: Exactly. And at the time the defendant
5 was convicted, the statutory penalties were there, that if it
6 was just a regular robbery, it was one period of incarceration,
7 but if you committed robbery with a dangerous or deadly weapon,
8 it was an enhanced penalty. So even though it was a common law
9 crime, the penalties were still there for enhancing it that
10 way, and the defendant would have to plead to it, and the court
11 would have to find those facts or you would have to be
12 convicted by a jury for that enhanced penalty.

13 THE COURT: So, the sum and substance of the
14 position the United States is whether we look at the force
15 clause under the statute or under the guidelines. Judge Bates
16 in the Moore opinion was dealing with a guidelines issue but
17 used the Johnson analysis?

18 MS. KING: Yes, Your Honor.

19 THE COURT: The position of the United States is
20 that at the time Mr. Warren was convicted of the robbery in
21 2002, that crime categorically fulfilled the force elements of
22 both the armed career criminal and the career offender
23 provisions of the guidelines?

24 MS. KING: Your Honor, I believe that it's really
25 only the armed career criminal statute that is at issue here

1 because this is not a drug case. Career offender applies to
2 drug cases, and so I do think that if this was a drug case,
3 yes, he would be, it would meet the career offender portion of
4 the guidelines, but in terms of the statutory language in the
5 armed career criminal statute, yes, that is our position.

6 THE COURT: So the statutory mandatory minimum in
7 this case, if you're correct, is 180 months?

8 MS. KING: Yes.

9 THE COURT: The guidelines calculation in the case,
10 however, is considerably more than that.

11 MS. KING: Yes. And that is based, in the
12 guidelines, on the fact that he is considered an armed career
13 criminal.

14 THE COURT: Do you want to address at this point
15 what Mr. Schorr has foreshadowed as being a discussion of one
16 of the drug offenses?

17 MS. KING: Yes, Your Honor. I did address this in
18 my response to Mr. Sindler's position with respect to
19 sentencing factors, but at the time that Mr. Warren was
20 convicted in 2002 of his drug trafficking crime, that crime was
21 punishable --

22 THE COURT: On Page 9, you say it was punishable by
23 up to 20 years in prison.

24 MS. KING: Yes, Your Honor. I did provide exhibits
25 and attached them to that pleading that I believe prove that.

1 So, I don't really have anything to add to that. I think it's
2 just a finding that the Court will have to make.

3 THE COURT: Okay. Thank you very much. We'll make
4 sure we don't leave here today until you and Mr. Schorr have
5 every opportunity to tell me whatever you want to tell me, so I
6 know we'll be back to you.

7 Mr. Schorr, sir, the floor is yours.

8 MR. SCHORR: Well, I think first, Your Honor, while
9 Exhibits 1 and 2 that the government submitted today are
10 interesting from the standpoint of a historical perspective,
11 they're not relevant because they're not the law at the time of
12 the offense.

13 Mr. Warren was arrested for that offense in December
14 of 2000 -- I'm sorry, January 2000, so we have to look at the
15 law at the time.

16 Now, Exhibit 6 --

17 December 2000.

18 Exhibit 6 is the only statute here as far as his
19 armed robbery conviction is concerned that we should be looking
20 at.

21 I'd like to call your attention to Section
22 486(b)(1). It says: Robbery retains its judicially determined
23 meaning, except that a robbery conviction requires proof of
24 intent to deprive another of property.

25 So we have to look at how robbery is defined by the

1 courts in Maryland.

2 So, while the Moore opinion is interesting -- I also
3 note the Moore opinion was 2016 and Judge Bates does not
4 discuss when Mr. Moore committed his robbery in Maryland, but I
5 would venture to guess that it was significantly later than
6 2000 because Judge Bates discusses the new statute, not the old
7 statute. So, I don't think Moore is necessarily dispositive as
8 far as what this Court should rule.

9 THE COURT: Let me ask you this, Mr. Schorr. If we
10 look, and I have the Westlaw printout copy, I'm looking at *3,
11 doesn't Judge Bates go beyond the statutory provisions and say,
12 okay, let's put all that aside and let's look at the Douglas
13 and Giles case and what that all means. Doesn't he say first,
14 those opinions really don't mean much, but even if they do mean
15 much, it's pretty clear that if threat to property was enough
16 to make out robbery, it still would come within the extortion
17 provisions.

18 MR. SCHORR: Let me take another look at Moore
19 myself, Your Honor, please.

20 THE COURT: He talks about the underlying offense in
21 Moore being robbery with a dangerous weapon. He says, well,
22 it's still a crime of violence because if you commit it by
23 threatening somebody else's property, you've committed
24 extortion within the meaning of a crime of violence under
25 4B1.2.

1 MR. SCHORR: 4B1.2 is not an issue here. However,
2 you can't ignore what the courts in Maryland have said. That's
3 what the judge here is doing. He's ignoring Maryland courts
4 and how they have handled it. Again, this is a Maryland
5 conviction we're talking about here and so what a judge in the
6 District of Columbia has to say is not as pertinent as what the
7 Maryland courts have said. I'm sure that anybody that looks at
8 it would say that's ridiculous, but that is what the Maryland
9 courts have said, you can't have a threat against property.

10 So, the problem here is, as Mr. Sindler argued,
11 robbery as it is defined and applied in Maryland is broader
12 than the generic definition. If you could include threats
13 against property --

14 THE COURT: Well, but doesn't he at Headnote 2, he
15 says where somebody is convicted in Maryland of robbery with a
16 dangerous weapon, a subsequent decision of the Court of Appeals
17 of Maryland, the top court there, says that robbery means
18 robbery with an instrument that was either designed to be used
19 in destroying, defeating, or injuring an enemy, or as an
20 instrument of offensive or defensive combat; (2) under the
21 circumstances of the case, immediately useable to inflict
22 serious or deadly harm, using as example, unloaded gun or
23 starter's pistol used as a bludgeon; or actually used in way
24 likely to inflict that sort of harm, microphone cord used as a
25 garrote.

1 He goes on to say: This Court does not see how
2 robbery by means of any such instrument could not involve the
3 use, attempted use or threatened use of force capable of
4 causing physical pain or injury to another person.

5 So isn't he saying that the highest court of
6 Maryland in 1989, which comes almost 20 years after both
7 Douglas and Giles, has said what robbery is in Maryland.

8 MR. SCHORR: Well, they do, but then you have to
9 look at it in the context of Johnson, which it has to be actual
10 physical violence, and there was no physical violence in this
11 case here.

12 THE COURT: Threat or attempt or the use of a weapon
13 which could cause it. You don't have to actually cause
14 violence, you don't have to shoot the bank teller, right?

15 MR. SCHORR: Right, you don't have to shoot the bank
16 teller, but in terms of how a robbery is defined in Maryland,
17 what I was saying earlier is a broader definition than the
18 generic definition of robbery because you can't have more than
19 a threat to a person.

20 THE COURT: But even if you're correct on that,
21 Mr. Schorr, if we then go to Alleyne and Descamps -- I may well
22 be butchering the names of those cases so if somebody has a
23 better pronunciation, tell me -- wouldn't we then go to the
24 actual charging documents in Mr. Warren's Maryland robbery case
25 and use the modified categorical approach and determine

1 whether, looking only at the charging documents, whether or not
2 he was necessarily charged with an offense that met the force
3 requirements of the ACCA statute, that it would be a divisible
4 statute and we then use not the categorical approach but the
5 modified categorical approach.

6 MR. SCHORR: Yes, I believe you're right there.

7 THE COURT: So what would happen -- I'm not saying
8 it does or doesn't apply, but if I conclude that Douglas and
9 Giles make Maryland law odd, to say the least from everything
10 we've been through in law school, make it odd, am I allowed to
11 look at the actual charging documents in Mr. Warren's case and
12 where does that lead us? Is it a divisible statute?

13 MR. SCHORR: I think you have to look at the
14 charging documents to determine it. But my understanding of --
15 if the statute is overbroad, you can't apply it. If the crime
16 is overbroad, you can't apply it.

17 THE COURT: Right, it's not a divisible statute, the
18 Supreme Court says I can't make it divisible if it is not
19 otherwise divisible.

20 Ms. King, any thoughts on the modified categorical
21 analysis? I'm the first to say, I find this to be very
22 complicated and very difficult. So, I would be -- I would be
23 thrilled if counsel finds it otherwise and can help me out, but
24 it's a tough issue.

25 MS. KING: I also find it difficult. But I do think

1 that this is not a divisible statute because I don't believe
2 that you can commit the crime of robbery with a dangerous
3 weapon against property. I think that even though those two
4 cases from 1970 in dicta posit that it might be possible that
5 you could commit a robbery by threatening to burn down
6 someone's house. That's not actually what those two cases were
7 about. Those two cases were about simple robbery, which
8 involved actual people that were there being threatened. So,
9 no other case, no other robbery case ever in Maryland has found
10 that you can commit a robbery against property.

11 So, I just don't think that that's an option. I
12 don't think that it's divisible.

13 If the Court, like you were saying, were to find
14 that you can commit an armed robbery or a robbery with a
15 dangerous weapon against property, then I would think it was
16 divisible, and I would think the modified categorical approach
17 would be proper.

18 But then when you go to charging documents in this
19 case, it is clear, this crime was not committed against
20 property. There are victims' names listed in the informations
21 which were attached as exhibits to Document 151 which show that
22 this was a crime that was committed against persons.

23 So, I think it brings you right back to the
24 beginning, which this was a crime which is a crime of violence
25 under the force clause of the armed career criminal statute.

1 THE COURT: I diverted away from Mr. Schorr.

2 Mr. Schorr, the floor remains yours.

3 MR. SCHORR: May I have a moment?

4 THE COURT: Absolutely.

5 (Whereupon, there was a brief pause in the proceedings.)

6 THE COURT: Mr. Warren, one thing I will say to you,
7 and I'm confident Mr. Schorr has talked with you about this.
8 To a degree, I try in court to make everything we do here as
9 clear as a bell to both lawyers and non-lawyers, but there's no
10 way around the issues here of them having a lot of technical
11 legal jargon in it. So I don't want you to think that the
12 Court or the lawyers are talking past you as a non-lawyer,
13 there's just no way to make it plain English.

14 THE DEFENDANT: I understand, Your Honor.

15 THE COURT: Mr. Schorr.

16 MR. SCHORR: In that case, Your Honor, if we're
17 going to look at charging documents, perhaps the government
18 should explain what is the threat in the charging document.
19 The indictment, the criminal information just says:
20 Feloniously with a dangerous and deadly weapon did rob and
21 violently did steal.

22 But where is the force? Where is the threat of
23 force? It is just repeating statutory or legal jargon, as you
24 said earlier.

25 THE COURT: But I guess the question is, does the

1 charging document saying "with a dangerous and deadly weapon,"
2 did rob. And we, therefore, look at the judicial determination
3 of rob or robbery in Maryland at the time of the offense that
4 Mr. Warren was convicted of, and that carries with it
5 everything that it carries with it.

6 MR. SCHORR: I'll be quite candid, Your Honor, I
7 don't know the answer to that as to how far we can go into
8 that. My feeling would be we'd have to actually look at the
9 police report charging the offense. That's the way I would
10 prefer to see it done so we know exactly what happened.

11 THE COURT: Under the modified categorical approach,
12 I can't go to the police report.

13 MR. SCHORR: I don't believe you can.

14 THE COURT: But I can look at the information and I
15 can look at the law of Maryland at the time the information or
16 the indictment was issued, I would think.

17 MR. SCHORR: Yes, I believe so. That's my
18 understanding.

19 THE COURT: Mr. Schorr, help me out. You also
20 highlighted one of the other arguments made by Mr. Sindler on
21 Mr. Warren's behalf which you have adopted related to one of
22 the two drug counts.

23 MR. SCHORR: Yes. This is the count that is set
24 forth -- the conviction set forth in the presentence report at
25 Paragraph 30.

1 THE COURT: I'm there.

2 MR. SCHORR: Now, I'm going to try -- first I'm
3 going to check and see Document 151 to see if everything is in
4 there that I need.

5 I don't think it's as complete as I'd like it to be.

6 I received these from Mr. Sindler. He advised me --
7 I'll mark these as Exhibit A for the defense.

8 I asked Mr. Sindler and he had gotten these from the
9 probation office.

10 So, I'd like to sort of work backwards on these
11 things, Your Honor.

12 If you would look, please --

13 THE COURT: Ms. King, do you have any objection to
14 the Court receiving into the record as Defense Exhibit A the
15 compilation document which Mr. Schorr has tendered? If you
16 can't answer now, you can say that.

17 MS. KING: Well, I can say that my only objection is
18 that this contains documents that I provided to the probation
19 office that don't have anything to do with this argument that
20 are incorrect. So, I can point that out to the Court.

21 THE COURT: We'll let Mr. Schorr state his position
22 and then we'll hear from you.

23 We'll conditionally receive it into the record,
24 Mr. Schorr, so you can talk about it as much as you want.

25 MR. SCHORR: All right.

1 If you would please, Your Honor, go to the second to
2 last page in this Exhibit A. It's labeled Charge Summary.

3 Do you see that?

4 THE COURT: Yes, it has the heading District Court
5 of Maryland for Baltimore city.

6 MR. SCHORR: Yes.

7 THE COURT: Got it.

8 MR. SCHORR: Bottom left corner dated January 3,
9 2002?

10 THE COURT: Correct.

11 MR. SCHORR: If you please look under Charge
12 Summary, it says -- it lists three counts. I have a little
13 arrow pointed toward the first one. It says: CHG/CIT 20696.
14 Statute 27 286(A)(1). Penalty 20 years or \$25,000.

15 THE COURT: Right.

16 MR. SCHORR: Now, if you then would turn, go forward
17 a number of pages, you'll come to the indictment.

18 THE COURT: I have it. It says date of offense
19 2 January 2002.

20 MR. SCHORR: Yes. The page just before that is
21 the -- it's Indictment No. 102017025, State of Maryland versus
22 Chemi Warren. That's dated January 17, 2002.

23 Then if you go to the indictment itself, Count One,
24 again, it has parenthesis (2 3350).

25 Do you see that?

1 THE COURT: I do.

2 MR. SCHORR: Again, I got these all from Mr. Sindler
3 who advised me he got them from the probation office, and I
4 guess they got them from Ms. King.

5 If you move forward several more pages, you'll come
6 to a page that looks like this, it's labeled --

7 THE COURT: It has 125 in the top right corner?

8 MR. SCHORR: Yes. If you look at two coding things,
9 the second one, it says:

10 CR 5-602.

11 Felony.

12 \$15,000 - five years.

13 Look at the bar code to the left 2 3550.

14 Now, there is an inconsistency between the first
15 document I showed you, which was this Charge Summary where they
16 showed a coding number of 2 0696 and a 20-year penalty.

17 Then you go to the indictment dated after that
18 Charge Summary and you have a 2 3550.

19 And then we see apparently that that code, that 3550
20 is called a CJIS code, Criminal Justice Information System. It
21 looks like between the date, January 3 of 2002 and January 17
22 of 2002, the charge against, the lead charge against Mr. Warren
23 changed from an offense carrying a 20-year sentence to an
24 offense carrying a five-year sentence maximum.

25 THE COURT: What about the charge at the top of the

1 page that has the 125 on it, the 0233 charge.

2 MR. SCHORR: I do not see that anywhere. That's the
3 second count in the indictment, but he did not plead to that.
4 He only pled to Count One.

5 THE COURT: Okay.

6 MR. SCHORR: If you look at the sentence in this
7 case, he got sentenced to five years with four years suspended,
8 correct, and then some probation.

9 So, there's that.

10 We're presented with a mountain of documents as far
11 as his criminal history is concerned, but the facts contained
12 in those documents belie what the government is saying. It
13 appears that his first felony drug conviction does not meet the
14 requirements, just from the papers themselves for the armed
15 career criminal.

16 THE COURT: So let me just recap for a second. You
17 can tell me if I'm understanding your argument.

18 The indictment related to that charge charged
19 Mr. Warren with three offenses.

20 MR. SCHORR: Yes.

21 THE COURT: Two of those offenses were under Section
22 3550?

23 MR. SCHORR: Yes.

24 THE COURT: One of which was under Section 0233.

25 MR. SCHORR: Yes.

1 THE COURT: Which is Count Two?

2 MR. SCHORR: Yes.

3 THE COURT: You're saying the offense of conviction
4 in Baltimore City Circuit District Court was by a plea of
5 guilty to Count One?

6 MR. SCHORR: Yes.

7 If you look at -- if you start with the indictment
8 and you turn back two pages, you'll see a sheet of paper
9 labeled Docket Entries at the top. And it has a lot of stamps
10 on it and handwriting filling in the blanks.

11 The top entry 5-6-02, No. 025, which are the last
12 digits of this offense number, Count One, plea - guilty.

13 Then underneath that CJOC - remaining counts, which
14 I imagine means they were dismissed or something. But he only
15 pled to that first count.

16 So, I think the mistake has been made --

17 THE COURT: You're saying on May 6, 2002, Mr. Warren
18 was convicted of a crime against the laws of Maryland. The
19 crime was the crime set forth at Count One of the indictment.

20 MR. SCHORR: Yes, which appears to have carried a
21 five-year maximum sentence.

22 His sentence is fairly consistent with that.

23 Now, what alerted us to this problem or this issue
24 was Mr. Warren had a pre-plea criminal history report prepared.
25 I don't know if the Court gets to see that or not.

1 THE COURT: I do when the defendant consents to it,
2 and Mr. Warren must have because I have it.

3 MR. SCHORR: If you would turn then in that document
4 to I believe -- I don't have a docket entry on this one.

5 THE COURT: ECF 41 filed June 30, 2014.

6 MR. SCHORR: That was in Paragraph -- look at
7 Paragraph 26.

8 THE COURT: Okay.

9 MR. SCHORR: Underneath the -- in the paragraph
10 there it says: Details of the offense being sought. Available
11 records certify the conviction and the presence of counsel when
12 sentenced, as detailed above.

13 Midway through it says: The "closed" charges
14 include possession with intent to
15 manufacture/distribute/dispense and unlawful possession. Count
16 One was amended from the original charge, which was
17 manufacture/distribute narcotic.

18 So, something happened between January 3rd of 2002
19 and January 17, 2002 where the charge, what Mr. Warren was
20 charged with changed. It appears that he was charged with a
21 lesser crime than what he was initially charged with --
22 indicted for a lesser crime, which appears to carry, based on
23 what we looked at in this Exhibit A, appears to carry only a
24 five-year maximum sentence. That is not a predicate offense.

25 THE COURT: So at some point, Mr. Warren was charged

1 with offenses, including by the indictment, charged with
2 offenses that had a maximum penalty under Maryland law of 20
3 years in prison?

4 MR. SCHORR: Yes.

5 THE COURT: But you're saying the offense to which
6 he pled guilty, that is, the offense of conviction was a crime
7 that had a maximum sentence under Maryland law of five years in
8 prison?

9 MR. SCHORR: I'm suggesting he was indicted and pled
10 guilty to the lesser offense.

11 THE COURT: He was earlier charged, but at the
12 indictment, the grand jury document, two charges were
13 punishable by 20 years in prison, one by five years in prison,
14 and it was that one you're saying he pled guilty to and,
15 therefore, that is the one he was convicted of.

16 MR. SCHORR: I believe so. Let me look at one thing
17 for clarification.

18 THE COURT: Sure.

19 We'll make sure we hear from Ms. King.

20 MR. SCHORR: If we go back, I know Exhibit A to the
21 very first document we looked at, he was initially charged, the
22 charge summary, Count Two -- Count One and Two both carried a
23 20 year sentence. Count Three carried a four years sentence
24 maximum.

25 What I'm saying is the Count One changed. Count Two

1 was dropped because he pled guilty to the new Count One. Count
2 Three was dropped.

3 Am I making myself clear?

4 THE COURT: I think. Let me ask you this,
5 Mr. Schorr. If we go to the very back document, it's dated
6 1-29-02, it has the indictment listing three counts. I'm just
7 curious on the Charge Summary, if you know the answer to this,
8 it says: CHG/CIT. It goes, 2, 3, 4, which leads to the
9 question, was there a one? Or doesn't that matter?

10 MR. SCHORR: I don't know what that means, Your
11 Honor, to be quite honest with you.

12 THE COURT: I don't either. And it may not matter.

13 MR. SCHORR: It may not matter.

14 MS. KING: Your Honor, if I could maybe be of some
15 assistance.

16 THE COURT: Ms. King, happy to hear from you.

17 Mr. Schorr, we will be sure to come back to you.

18 MS. KING: I think on the Charge Summary, the
19 charged count, the 02 090696, if you look to the actual
20 indictment or the 4 3550, I don't think those are Counts One,
21 Two, Three, Four, I think those relate to whatever those
22 numbers are that are in the parenthesis. That's my take on it.

23 THE COURT: They have something to do with Maryland
24 law.

25 MR. SCHORR: Yes. In fact, Your Honor, when

1 Mr. Warren and I were discussing this yesterday, we actually
2 Googled CJIS 3550 and a Maryland website pops up and it tells
3 you put in 3550. Then there's a 2 3550; 3 3550, so I'm not
4 sure what all that means. But the point is, looking at this
5 document that starts with 125 at the top, it looks like with
6 the bar code attached for the second entry there, he was only
7 charged with an offense that carried a five-year sentence.

8 THE COURT: He was only convicted of an offense.

9 MR. SCHORR: He was convicted of that, yes.

10 THE COURT: Let me ask you this, Mr. Schorr. If
11 you're correct, then other than the fact that it's legally
12 challenging, the issue of the Maryland robbery law isn't --
13 Mr. Warren would not be an armed career criminal no matter what
14 I conclude as to the Maryland robbery law?

15 MR. SCHORR: Right.

16 THE COURT: And then if I conclude you're correct, I
17 would do what, send it back to the probation office and direct
18 them to, as they're obligated under Rule 32 and 3553 and 3552
19 to prepare an addendum to the presentence report recalculating
20 the now advisory sentencing guidelines?

21 MR. SCHORR: I think so.

22 THE COURT: You have every reason to believe if
23 Mr. Warren is not defined as a statutory armed career criminal,
24 there would be a material difference in the advisory guideline
25 calculation, and would the mandatory minimum sentence drop out

1 of the case if you're correct?

2 MR. SCHORR: Yes, I believe so.

3 THE COURT: We'll come back to you, Mr. Schorr.

4 Ms. King, the floor is yours.

5 MS. KING: Thank you, Your Honor.

6 These are documents, some of which I had myself
7 pulled from the Internet, including this document, which --

8 THE COURT: That's in Defendant's Exhibit A?

9 MS. KING: Yes, Your Honor. I don't know exactly
10 what page it is on, but I can say this has nothing to do with
11 this. I had included it because it didn't occur during
12 research that I was doing, but what I came to discover is that
13 the defendant, in fact, pleaded guilty to Count One, and if the
14 Court looks at the fourth page from the end, which has some
15 handwriting and it is a court document --

16 THE COURT: Looks like it's out of a journal that
17 some bailiff or docket clerk keeps?

18 MS. KING: Yes, Your Honor. Actually, the first
19 page says Docket Entry, so I think it's a handwritten docket
20 entry, Your Honor. You may be familiar with that from here in
21 Allegheny County.

22 But it says that on May 6, 2002, the defendant
23 pleaded guilty to Count One, the charge of distribution of
24 heroin. That's what he pled guilty to. The indictment itself
25 alleges that at Count One, that he, the defendant, distributed

1 heroin, which is a narcotic drug.

2 I had attached to my response to Mr. Sindler as
3 Document 151, Exhibit 3.

4 THE COURT: Let me flip to that, Ms. King.

5 Okay, I'm there.

6 MS. KING: This is the Maryland Code that was in
7 effect at the time the defendant was convicted. This is the
8 statute under which he was convicted. So, Section (b) lists
9 out the penalties. That's a little bit more than halfway down
10 the page.

11 THE COURT: I see it.

12 MS. KING: It says: Any person who violates any of
13 the provisions of subsection (a) of this section, and then
14 subsection (a) of this section criminalizes distribution of
15 controlled substances.

16 With respect to (b) (1), a substance classified in
17 Schedules I or II, which is a narcotic drug, is guilty of a
18 felony and subject to imprisonment for not more than 20 years.

19 So that was the maximum penalty for the crime to
20 which the defendant pleaded guilty.

21 Going down to (b) (3), if it had been a Schedule I,
22 II, III, IV or V dangerous substance, it would have been not
23 more than five years. However, heroin is a Schedule I
24 controlled substance and as a result, as is indicated in the
25 indictment, it specifically says he pled guilty to heroin and

1 in the Charge Summary, which lists out that the penalty is 20
2 years or more, that is the crime to which the defendant pleaded
3 guilty and was sentenced. He received five years, but the
4 maximum penalty was 20 years.

5 THE COURT: So (b) (1) says if it's a Schedule I
6 narcotic drug, it's 20 years; (b) (3) says if it's a Schedule I
7 dangerous substance, other than a narcotic drug, that it's five
8 years.

9 MS. KING: Yes.

10 THE COURT: So what --

11 MS. KING: On the last page it says: Distribution
12 NARC, N-A-R-C, which I'm assuming means narcotic drug.

13 THE COURT: So Count One of the indictment says that
14 the defendant unlawfully did distribute a certain controlled
15 substance of Schedule No. 1, to wit: Heroin, which is a
16 narcotic drug, to a certain -- and it lists the name of a
17 person. It references Article 27, Section 286.

18 MR. SCHORR: You'll note, Your Honor, it doesn't say
19 any subsection here. That was the same complaint made by --
20 not complaint, the observation made in the pre-guilty
21 presentence report. We don't know what subsection of Section
22 36 he's charged under.

23 THE COURT: Count One charges a Schedule I narcotic
24 drug.

25 MS. KING: And it charges distribution. So while it

1 does not list (a) (1), it is clear that he was charged and
2 pleaded guilty to distributing a Schedule I narcotic drug,
3 heroin.

4 THE COURT: Let me ask you this, Ms. King.

5 And, Mr. Schorr, we'll hear from you not only on the
6 question I'm about to ask but whatever else you were about to
7 tell me.

8 Does it matter if --

9 I take it back. Mr. Schorr, looking at the charge
10 summary, the 3550 has a maximum penalty of four years?

11 MR. SCHORR: Yes.

12 THE COURT: So we know or we could infer that a
13 five-year sentence is inconsistent with 3550.

14 MR. SCHORR: Well, not necessarily, Your Honor. I
15 don't know enough about how those work.

16 THE COURT: I apologize, Mr. Schorr, I interrupted
17 you. You were about to tell me something.

18 MR. SCHORR: Totally flowed out of my head.

19 THE COURT: I apologize.

20 Ms. King says if we look at the indictment, it
21 charged a violation of Section 286. It specifically charged
22 distribution of a dangerous substance that was Schedule I,
23 which was a narcotic drug.

24 She says if we go to 286, which Mr. Warren was
25 charged by indictment with violating, 286 says if it's a

1 dangerous substance that is also a narcotic drug on Schedule I,
2 then the maximum term is 20 years.

3 MR. SCHORR: Yes. What I'm saying, Your Honor, is
4 we don't know -- something happened, I don't know, we know that
5 he got sentenced to basically a year in jail, four years
6 suspended sentence.

7 THE COURT: Right.

8 MR. SCHORR: He's prepared to explain. We're all
9 kind of grasping at straws. This is something that happened in
10 2002, 14 years ago. Only one person knows what happened,
11 that's Mr. Warren. He's more than willing explain to the
12 Court.

13 THE COURT: If you want to have him explain it, I'm
14 happy to hear from him. We will swear him in.

15 MR. SCHORR: He has been sworn in already.

16 THE COURT: Do you want to have him take the witness
17 stand?

18 MR. SCHORR: If you prefer, or he can sit here.

19 THE COURT: I just think it's easier if Ms. King may
20 want to ask him any questions.

21 Marshals, any problem with Mr. Warren taking the
22 witness stand?

23 THE MARSHAL: No, sir.

24 THE COURT: Mr. Warren, you may take the witness
25 stand.

1 Sir, you're under oath.

2 ATIBA WARREN, a witness having been duly sworn, testified
3 as follows:

4 THE COURT: Mr. Warren, sir, you are under oath.

5 Mr. Schorr, you may examine, sir.

6 DIRECT EXAMINATION

7 BY MR. SCHORR:

8 Q. Please state your name.

9 A. Atiba Chemi Warren.

10 Q. Spell the first and middle name for the court reporter.

11 A. A-T-I-B-A, middle, C-H-E-M-I.

12 Q. You have heard us talking about this issue. Can you tell
13 us what happened as far as your conviction in 2002 for the drug
14 charge that we're discussing today?

15 A. Yes, I sure can. It was actually a drug charge in front
16 of Judge Roger Brown, which is retired. The basic -- I didn't
17 have a record at the time. He said, I'm willing to do this for
18 you. The charge carries five years. I'm going to suspend four
19 years of the five. You have five months in of the time.

20 Another month you'll be home and you have three years
21 probation.

22 Q. Did he tell you what you were pleading to?

23 A. Yes. The five years was the maximum penalty and/or a fine
24 of 15,000.

25 Q. Did you have a signed plea agreement to that?

1 A. No, it was a verbal plea agreement because the charge was
2 amended from the original charge at the preliminary hearing
3 when the indictment came up.

4 Q. Did you have a lawyer there?

5 A. Yes, I did.

6 Q. Who was the lawyer?

7 A. I believe his name was Christian -- Creston.

8 Q. Was there any kind of a colloquy with a question and
9 answer session between you and the judge?

10 A. Yes.

11 Q. Did he explain the charges that you were pleading to?

12 A. He explained them clearly.

13 Q. Do you recall what he explained in that regard?

14 A. He basically explained that I was pleading under the
15 subsection 286 -- 270 -- 286, I can't remember like the actual,
16 you know, subsections, but he basically said the maximum
17 penalty that he could have gave me that day was five years
18 and/or 15,000. He said, I'm going to suspend four years of the
19 five, give you one year jail time and in another month because
20 on a drug charge in Maryland, you only do six months, you will
21 be home and take this probation as -- how did he put it, as a
22 new lease on life. If I see you in my courtroom again, I'm
23 going to give you the remainder of the suspended sentence.

24 MR. SCHORR: I have nothing further, Your Honor.

25 THE COURT: Thank you, Mr. Schorr.

1 Ms. King or Mr. Ortiz?

2 MS. KING: I don't have any questions, Your Honor.

3 THE COURT: I have a few. Then we'll see if counsel
4 have any other.

5 THE DEFENDANT: Do you want me to look this way?

6 THE COURT: You're fine talking into the mic.

7 Your lawyer when you were before Judge Brown, is
8 that a lawyer you or your family hired or was it someone
9 appointed for you?

10 THE DEFENDANT: I want to say it was somebody we
11 hired. I'm pretty sure.

12 THE COURT: The name you gave, was that that
13 lawyer's first name or last name?

14 THE DEFENDANT: I believe it was his last name.

15 THE COURT: Did you after this sentencing and plea
16 hearing with Judge Brown, did you ever have any further
17 dealings with that lawyer, sir?

18 THE DEFENDANT: No. No, not after that, no, sir.

19 THE COURT: Do you have any idea of that lawyer's
20 whereabouts, sir?

21 THE DEFENDANT: I sure don't, Your Honor. It was so
22 long ago. I'm not actually sure. I left Baltimore.

23 THE COURT: Thank you, Mr. Warren.

24 Mr. Schorr, any follow-up to the Court's questions?

25 MR. SCHORR: No, sir.

1 THE COURT: Ms. King, do you or Mr. Ortiz have any
2 follow-up to the Court's questions?

3 MS. KING: No, Your Honor.

4 THE COURT: Thank you.

5 Mr. Warren, you can step down, sir.

6 THE DEFENDANT: Thank you.

7 MR. SCHORR: Your Honor, the government has to prove
8 by a preponderance that an enhancement applies. The issue here
9 deals with whether this drug felony qualifies as a predicate
10 offense. I don't think there's been enough evidence here. You
11 have a witness who tells you that he was sentenced to something
12 that carried a five year maximum.

13 THE COURT: Or at least he was told that.

14 MR. SCHORR: He was told that. We have some
15 documents received that contradict a 20-year sentence.

16 Now, as I said, I got these documents from
17 Mr. Sindler. He told me he got them from probation, and I
18 guess Ms. King gave them to probation.

19 Now she's telling us the one thing we looked at was
20 No. 125 at the top is something she pulled off the Internet. I
21 don't know what that means. However, as I said earlier, it is
22 consistent with the kind of sentence Mr. Warren got, as a
23 first-time offender, to get a five-year sentence with the time
24 suspended.

25 And consistent with his testimony, he said the Judge

1 told him he was a first-time offender. He had no record. If
2 you look at his presentence report, his convictions all
3 occurred, with the exception of possession of an open
4 container, they're all dated after May of '02. Regardless of
5 when they happened, when he was arrested, but that conviction
6 was the first one he had. So --

7 THE COURT: The date of conviction, the date of the
8 court event?

9 MR. SCHORR: Yes, the date of the conviction is May
10 6, '02. If you look at paragraphs -- I'm looking at Paragraphs
11 25 through 31 -- I'm sorry, 33, all of these convictions with
12 the exception of Paragraph 26 are after that date. So the
13 Court is going to have to draw some inferences here that a
14 judge in Baltimore 14 years ago saw a first-time offender
15 before him and said, I don't want to saddle you with a 20-year
16 possible sentence or a conviction that carries that. This is
17 the lesser included offense we're going to go with.

18 THE COURT: Or for whatever reason, told Mr. Warren
19 and his lawyer that the maximum penalty to a charge for which
20 he's pleading guilty was five years in prison.

21 MR. SCHORR: Yes.

22 THE COURT: In fairness to counsel, I would note
23 only because I've had interactions from time to time with state
24 court judges in Baltimore, none of whom are in Baltimore
25 County, I do know that in sentencing in the State of Maryland,

1 judges have a broad discretion to suspend portions of
2 sentences, and that they use that as sort of their own judicial
3 supervised release, that they will suspend a portion of a
4 sentence with the idea that if there's a violation, then the
5 defendant comes back for resentencing.

6 I don't know that that has any relevance to this,
7 but since I know it, I thought I would tell each of you.

8 It doesn't strike the Court as odd to look at a
9 docket entry and to see 80 percent of a sentence suspended by a
10 trial judge in Maryland, apparently they do that.

11 Mr. Schorr, anything further in these regards?

12 MR. SCHORR: Your Honor, I believe we presented you
13 everything we have. You're going to have to make a decision as
14 to the armed robbery conviction. I believe that the drug
15 conviction does not qualify as a predicate offense.

16 THE COURT: Because the maximum penalty wasn't ten
17 years or more?

18 MR. SCHORR: Exactly. And so I'm asking the Court
19 when you make that ruling, take that under advisement.

20 THE COURT: Appreciate that, Mr. Schorr.

21 Ms. King and Mr. Ortiz, I don't mean to leave you
22 out.

23 MS. KING: Your Honor, again, I would point to the
24 fact that the documents I attached to Document 151 are
25 documents provided from the court, which show that the

1 defendant pleaded guilty to distribution of heroin, a narcotic
2 drug, and the statute itself has the maximum penalty of 20
3 years for that crime.

4 So, while the defendant was sentenced to five years,
5 it's not unusual that you would not receive the maximum penalty
6 of 20 years for a crime like that. So, I don't think his
7 actual sentence has anything to do with what the possible
8 sentence could be, which I believe is 20 years, and I believe
9 the documents bear that out.

10 THE COURT: Let me ask you this, Ms. King --

11 And Mr. Schorr, we'll hear from you also, if you
12 want to be heard on this.

13 Does it matter if I conclude that Mr. Warren's
14 testimony was accurate in the sense of he accurately reported
15 what happened in Judge Brown's courtroom when he entered his
16 plea of guilty?

17 More specifically, if it is true that Judge Brown at
18 the time of Mr. Warren's plea told him that the maximum penalty
19 for the offense to which he's pleading guilty is five years in
20 prison, does that matter?

21 Each counsel is free to say, Judge, I want to think
22 about that, I will tell you later on. If you know now, I'm
23 happy to hear your answer.

24 MS. KING: Your Honor, I would like the opportunity
25 to look into this. I'd also like the opportunity to try to

1 find some type of transcript about this because that's a
2 surprisingly accurate memory of something that happened so long
3 ago, so I would like to look into that. I do think, again, the
4 fact remains that the documents show what they show. I'd like
5 to be able to look into that.

6 THE COURT: Understood. That's fine.

7 Mr. Schorr, do you want to respond to the Court's
8 question now or after you think about it?

9 MR. SCHORR: I'm not one to shoot from the lip, Your
10 Honor, but my initial reaction would be that if a judge tells a
11 defendant you're going to be pleading to something that carries
12 a maximum sentence of five years, and that's not actually the
13 case, that goes to the validity of that guilty plea because
14 it's not a knowing, voluntary and intelligent and informed
15 guilty plea. That opens up a whole new can of worms.

16 I would like to see a transcript, too. If we can't
17 get one from 14 years ago, then I think all you have is
18 Mr. Warren's word at this point.

19 MS. KING: That's not all you have, Your Honor.

20 THE COURT: On that question, on the question of
21 what happened in Judge Brown's courtroom on that day in terms
22 of the oral statements of Judge Brown and Mr. Warren,
23 Mr. Schorr is saying at the moment all we have is what
24 Mr. Warren reported.

25 MS. KING: Yes, Your Honor.

1 THE COURT: So, Ms. King, procedurally, what do you
2 think we should do?

3 MS. KING: I think we should set the sentencing
4 hearing, Your Honor.

5 THE COURT: What do you want to do before the
6 sentencing hearing occurs?

7 MS. KING: I definitely would like to file my
8 sentencing memorandum, which I usually do two weeks prior to
9 sentencing. Then I'd also like to look into this question and
10 have the opportunity to provide the Court with some information
11 that I'm able to find relative to this question.

12 THE COURT: So, setting those other two dates will
13 turn on giving you a reasonable period of time and Mr. Schorr a
14 reasonable period of time to do the digging that you've each
15 indicated would be appropriate.

16 So, how much time -- why don't you tell me when you
17 would like to file your sentencing memorandum? You can give me
18 a ballpark if you want.

19 MS. KING: Would you like all this information in
20 the sentencing memorandum? I could include it all together.

21 THE COURT: Is that what you would like to do?

22 MS. KING: That's fine with me, Your Honor, yes.

23 THE COURT: When would you like to file it?

24 MS. KING: 30 days would be good.

25 THE COURT: That's great.

1 Mr. Schorr --

2 Let me ask you this, Ms. King. Would you intend
3 that if you get transcripts, attorney notes, where Attorney
4 Christian is, or Judge Brown is, I don't know, Judge Brown
5 probably had more cases and less files than Attorney Christian,
6 if I'm pronouncing his name correctly.

7 It seems to me, Mr. Schorr, you each may want to
8 react to each other's sentencing memo.

9 MR. SCHORR: I think so, Your Honor.

10 THE COURT: Mr. Schorr may say some things that you
11 want to weigh in on, Ms. King, and it sounds to me you likely
12 will say some things that Mr. Schorr wants to weigh in on.

13 What if we said sentencing memos from each of you,
14 we'll set a date about 30 days out, and then each of you will
15 have 14 days to file something, if you want, as a follow-up to
16 the opposing sentencing memo. And then I'll look at dates that
17 bear out once we string that out and set what I'll call a
18 targeted sentencing date. It will be the sentencing date,
19 unless it has to get moved because of intervening events.

20 If we do that process, Ms. King, can the United
21 States live with that?

22 MS. KING: Yes, thank you.

23 THE COURT: Mr. Schorr, can you live with that?

24 MR. SCHORR: I don't have to file anything until
25 sometime after June 6th, correct?

1 THE COURT: Correct.

2 MR. SCHORR: Good.

3 THE COURT: Actually, sometime after June 10th.

4 MR. SCHORR: Perfect.

5 THE COURT: So we'll get some dates out, we'll get
6 an order up either this afternoon or tomorrow morning. When
7 counsel looks at them, if there's a problem, we'll adjust it.

8 If counsel in their efforts to gather information,
9 since ultimately I'm going to have to make a decision here,
10 believe that there's some process of the Court that is needed
11 directed to some judicial office or whatever in the State of
12 Maryland, file a motion and if I think I'm -- if you think this
13 may be one of those cases where the All Writs Act actually does
14 reach to the ability of the Court to issue a writ to somebody
15 else to get us what we need. So, I'll probably take a little
16 time in, Ms. King, for me to review your sentencing memos, and
17 to issue tentative findings that rule on these two questions.

18 In fairness to the parties, I will rule on both
19 questions because if this is not the last judicial stop in this
20 case, I think anybody else will want me to have ruled on both
21 questions because I can be right on both, I can be incorrect on
22 both, but I could right on one and incorrect on the other and
23 then someone will want to know what those rulings are. I will
24 rule on both questions, unless your sentencing memos indicate
25 that they're not -- either or the other is no longer live as an

1 issue before the Court.

2 So, Mr. Warren, what this all means is because this
3 is such a central issue to determining what your sentence is
4 and whether you'll be subject to a mandatory minimum sentence
5 of 15 years in federal prison, we're going to give your lawyer,
6 Mr. Schorr, and the lawyers for the United States an
7 opportunity to address the Court in writing on the matters that
8 were raised today, perhaps identify additional information,
9 transcripts, or other things, get that to the Court, respond to
10 each other, give me time to read it and rule on where this all
11 fits in on your sentence.

12 So, unfortunately, sir, first I find that the
13 request of your lawyer, Mr. Schorr, and the lawyer for the
14 United States to do that is completely reasonable, given the
15 important circumstances in this case, both for the United
16 States and for Mr. Warren. So, it does mean, Mr. Warren,
17 there's going to be a bit of a delay in your sentencing date
18 occurring, but this, to use a common term, it does seem to the
19 Court that this issue, these two issues are, in essence, game
20 changers in determining what the sentence would be and what the
21 range the Court is obligated to consider or permitted to
22 consider in this case.

23 So, we'll get an order out that schedules those
24 dates, and if counsel has a difficulty with them or if there's
25 an intervening event, just let the Court know and we'll make

1 the adjustments we need to make.

2 Mr. Schorr, is there anything else you think we
3 should take up today?

4 MR. SCHORR: No. My client said he wanted to put
5 something on the record.

6 THE COURT: Do you want to have him tell it to you
7 first?

8 MR. SCHORR: Yes, please.

9 (Whereupon, there was a brief pause in the proceedings.)

10 MR. SCHORR: Your Honor, going back to that Exhibit
11 A, if you look at the first page.

12 THE COURT: Very top page?

13 MR. SCHORR: Very top page.

14 THE COURT: I have it in front of me.

15 MR. SCHORR: If you look at the left margin, you'll
16 see where it says 001 00 C USER.

17 THE COURT: I do.

18 MR. SCHORR: Says Code 2 3550.

19 THE COURT: I do.

20 MR. SCHORR: If you go back to the indictment, the
21 third count has a 3550 number, four-year sentence.

22 That is, it has a four in front of it, 4 3550. Not
23 quite clear exactly, but Mr. Warren wanted me to bring that to
24 your attention, that that looks like that's the count --
25 there's some confusion there, but maybe I'm not saying it

1 right.

2 THE DEFENDANT: Can I explain it, Your Honor?

3 THE COURT: Is that okay with you, Mr. Schorr?

4 MR. SCHORR: That's fine, Your Honor.

5 THE COURT: Mr. Warren, sir.

6 THE DEFENDANT: I believe this is a discrepancy on
7 the actual charging documents and actual certified conviction.
8 On the certified conviction, this is what we have right here
9 that Ms. King has the originals to.

10 THE COURT: I have it in front of me, sir.

11 THE DEFENDANT: It says: Code 2 3550, CDS unlawful
12 manufacture.

13 THE COURT: I see that.

14 THE DEFENDANT: That's what the actual certified
15 conviction says. That 2 3550 has great significance.

16 And I'll draw your attention to the indictment. It
17 says 2862-3550.

18 THE COURT: I see that, sir.

19 THE DEFENDANT: If I draw you back to the actual,
20 the penalty - 20 years, the charge summary, it says: 2 0696,
21 27 286(a)(1), specific subsection (a)(1).

22 If I draw your attention back to the page with the
23 bar code on it --

24 THE COURT: I have that, sir.

25 THE DEFENDANT: It's the page that has 125 at the

1 top.

2 THE COURT: Yes, sir.

3 THE DEFENDANT: These are certified by the State of
4 Maryland. This says where the bar code is 2 3550, CDS
5 distribution. It says maximum penalty - five years; 15,000;
6 still a felony, only carries five years.

7 I would like the Court to examine that 2 3550
8 because that's what I pled to, that's what is on the certified
9 conviction, irregardless if it says distribution of heroin
10 that's handling and receiving. This is computerized from the
11 Clerk of Courts down in Baltimore City.

12 THE COURT: Okay. Thank you, Mr. Warren.

13 Ms. King, is there anything you'd like to ask
14 Mr. Warren about what he just told me?

15 MS. KING: No.

16 I'd like, it says: Note, do not use for narcotics,
17 which heroin is a narcotic and it was charged as a narcotic on
18 the bar code page we were just looking at.

19 THE COURT: The bar code page being the one that
20 says 125 at the top?

21 MS. KING: Yes, Your Honor.

22 THE COURT: Understood.

23 Ms. King, here's what I'm going to do. I'm going to
24 receive Exhibit A into the record. You and Mr. Schorr can tell
25 me what to make of it. If there are any pages or parts of it

1 that you believe don't have relevance to the issues before the
2 Court, you're free to point that out in your sentencing memos.
3 We'll receive it into the record since we've spent time
4 examining it and walking through it.

5 Mr. Schorr, anything else we should take care of or
6 put on the record today?

7 MR. SCHORR: No, sir.

8 THE COURT: Ms. King? Mr. Ortiz?

9 MS. KING: Nothing, Your Honor. Thank you.

10 MR. ORTIZ: No, thank you, Your Honor.

11 THE COURT: Mr. Greer, anything we wanted to talk
12 with counsel or Mr. Warren about that has been unexplored so
13 far?

14 MR. GREER: No, Judge.

15 THE COURT: Counsel, we will post later today as a
16 notice to counsel on the ECF docket a link to a Maryland
17 website regarding guidelines and offense table. I'm not
18 stating that that has necessarily any relevance to any of this,
19 but it does appear to be a source of information about these
20 CIS or CJIS codes. And if I intend to in any way rely on that
21 in any decision I make, I will give notice to counsel so you'd
22 have an opportunity to tell me what to make or not make of it,
23 but I just wanted to advise you we did find that link online.

24 MR. SCHORR: Is that as of 2001 or 2002 or it is
25 current?

1 THE COURT: Appears to be current. That's why I
2 said it may or may not have any bearing on any of this.

3 Anything else we should talk about with counsel,
4 Mr. Greer?

5 MR. GREER: No, Judge.

6 THE COURT: Mr. Babik?

7 MR. BABIK: No, Judge.

8 THE COURT: In a moment we'll adjourn this hearing,
9 I'd ask those present in the courtroom to remain seated and at
10 ease while the marshals assist Mr. Warren.

11 (Court adjourned.)

12 -----

13

14 CERTIFICATE

15

16 I, Juliann A. Kienzle, certify that the foregoing is
17 a correct transcript from the record of proceedings in the
above-titled matter.

18 s/Juliann A. Kienzle, RMR, CRR

19 Juliann A. Kienzle, RMR, CRR

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